

GRUMA CORPORATION)	
d/b/a MISSION FOODS)	
)	
and)	Cases 04-CA-199438
)	04-CA-202091 and
UNITED FOOD AND COMMERCIAL)	04-CA-209548
WORKERS LOCAL 1776)	
)	
)	
)	

Gruma Corporation d/b/a Mission Foods (“Respondent”), through its undersigned attorneys, hereby moves to sever Case No. 04-CA-209548, pursuant to Section 102.33 of the National Labor Relations Board (“NLRB” or “Board”) Rules and Regulations. This motion is based on the following:

1. On or about October 31, 2017, the Regional Director for Region 4 of the National Labor Relations Board issued the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing concerning certain allegations arising out of Respondent's Mountain Top, PA facility.

2. The Order consolidated Case Nos. 04-CA-199438 and 04-CA-202091 and issued a Consolidated Complaint based on charges filed by United Food and Commercial Workers Local 1776 (the “Union”). Case Nos. 04-CA-199438 and 04-CA-202091, as amended (the “Withdrawal of Recognition Case”) were filed in May-July 2017 and contain specific allegations of threats and bad faith bargaining tainting a decertification petition that was resulted in the Respondent withdrawing recognition of the Union on June 20, 2017 and thereafter making

certain changes in terms and conditions of employment to bring the Mountain Top facility in line with Respondent's other non-union facilities. The hearing on the Withdrawal of Recognition Case is scheduled for December 18, 2017. This case is expected to last approximately 6 days and was anticipated to require the testimony of approximately 23 witnesses (8 for the GC and 15 for Respondent).

3. On November 7, 2017, Case No. 04-CA-209548 was filed alleging that two (2) employees were fired for their union activity in November 2017 and that another employee was threatened with discharge on October 30, 2017 for questioning the legitimacy of the investigation that led to the discharges (the "Discipline Case").

4. The Region hastily investigated and promptly found merit in the Discipline Case. On December 1, 2017, the Region filed an Amended Complaint that is attempting to consolidate the Withdrawal of Recognition Case with the Discipline Case. These cases should not be tried together, as the two Cases: (i) involve completely different factual scenarios; (ii) there are no efficiencies to be gained by trying the two Cases together, and (iii) Respondent would be prejudiced by the two Cases proceeding together.

B. Severance

5. The Board's Rules and Regulations § 102.33 states, "[m]otions to consolidate or sever proceedings after issuance of complaint shall be filed as provided in section 102.24 and ruled upon as provided in section 102.25."

6. Either consolidation or severance is appropriate when "necessary in order to effectuate the purposes of the Act or to avoid unnecessary costs or delay" *Id.*

7. Section 102.24 provides that a motion to sever be filed with the chief administrative law judge or one of the associate chief judges. In deciding a motion to sever, "the

judge has the discretion to determine whether consolidation, or severance, of any complaint is warranted, considering such factors as the risk that the matters litigated in the first proceeding will have to be re-litigated in the second and the likelihood of delay if consolidation, or severance, is granted.” *Unbelievable, Inc.*, 324 NLRB 1225, 1226 (1997).

8. Respondent seeks to have the Discipline Case severed from the Withdrawal of Recognition Case.

C. **There will be no re-litigation of issues upon severance because the Discipline Case involves completely different factual scenarios and separate witnesses from the Withdrawal of Recognition Case**

9. The alleged unlawful conduct in the Discipline Case involves the discharge of two (2) employees, who were terminated on November 6, 2017 after getting into a physical and verbal altercation on the plant floor. The two (2) discharged employees have not been identified as witnesses in the Withdrawal of Recognition Case.

10. In addition, the Discipline Case also involves other Section 8(a)(1) allegations concerning an alleged threat of discharge on October 30 to a third employee for allegedly questioning the legitimacy of the investigation. Again, while the person who was allegedly threatened is not identified, there is no indication that this employee is a necessary witness in the Withdrawal of Recognition Case.

11. The Withdrawal of Recognition Case alleged specific unlawful threats on January 16, January 22, April, May 31, and June 15, 2017 and bad faith bargaining from November 2016 until June 20, 2017, when the Respondent withdrew recognition following receipt of a decertification petition signed by a majority of the workforce. This case also questions the Respondent’s unilateral grant of certain benefits that had been provided to Respondent’s non-

union plants after receipt of the decertification petition and the Withdrawal of Recognition of the Union.

12. Because the issues in the Discipline Case are entirely unrelated to the issues in the Withdrawal of Recognition Case, there will be no re-litigation if the cases are severed.

D. No delay will result from severance and there are no efficiencies from trying the Discipline Case together with the Unilateral Cases.

13. Severing the two cases will result in improved efficiency as the trial for both cases will be significantly shortened and focused on the evidence relevant to the separate cases.

E. Respondent would be prejudiced by trying the Discipline Case together with the Withdrawal of Recognition Case

14. Region 4 has essentially consolidated two completely separate trials involving completely separate fact patterns and issues.

15. As there are no efficiencies to be gained from consolidating the two sets of Cases, the only possible reason for Region 4 to consolidate the two Cases is to “poison the well” such that evidence of alleged unlawful conduct in one of the Cases can be improperly used as evidence of unlawful conduct in the other Case. It is the classic case of “throw it at the wall and let’s see what sticks.”

16. Respondent would be prejudiced by Region 4 going forward with presenting evidence of what is essentially two entirely separate hearings together. The Discipline Case and the Withdrawal of Recognition Case should stand on their own merits, and Region 4 should not be allowed to use fabricated “efficiencies” as an excuse for an improper attempt to seek an edge in presenting its evidence.

F. Conclusion

17. For the reasons discussed above, the claims in this case should be severed into two hearings: one to address the Withdrawal of Recognition Case and another to address the Discipline Case.

Dated this the 11th day of December, 2017.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
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CERTIFICATE OF SERVICE

This is to certify that on the 11th day of December, 2017, a .pdf copy of Gruma Corporation d/b/a Mission Foods' Motion to Reschedule Hearing was filed through the NLRB E-Filing system and, in accordance with NLRB Rules and Regulations Section 102.114(i), served by certified mail, return receipt requested, to:

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Dated this the 11th day of December, 2017.

OGLETREE, DEAKINS, NASH,
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By:


Charles E. Engeman, Esq.